UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

UNITED STATES OF AMERICA, Complainant,	)	8 U.S.C. § 1324a Proceeding
v.	)	OCAHO Case No. 97A00116
SPRING & SOON FASHION INC., d/b/a Y PLUS S CORPORATION, d/b/a Y PRUS S CORPORATION, Respondents.	)	Judge Robert L. Barton, Jr.

ORDER GRANTING IN PART COMPLAINANT'S MOTION FOR SUMMARY DECISION, DENYING COMPLAINANT'S MOTION TO COMPEL, AND GRANTING COMPLAINANT'S MOTION TO SUBSTITUTE COUNSEL

(July 8, 1998)

I. INTRODUCTION

This case centers around Complainant's allegations that Respondent Spring & Soon Fashion Inc. (Spring & Soon) violated the Immigration and Nationality Act (INA) by hiring employees knowing they were unauthorized to work in the United States and by failing to comply with the employment eligibility verification requirements of the INA. Complainant also seeks to hold Respondent Y Plus Corporation d/b/a Y Prus Corporation (Y Plus) responsible for any violations actually committed by Spring & Soon. The main issues in this Order are:

(1) whether Complainant has demonstrated that there are no genuine issues of material fact in this case; and

(2) whether Complainant has demonstrated that it is entitled to judgment as a matter of law against Spring & Soon and/or Y Plus.

This Order disposes of all outstanding motions. For the reasons discussed in detail below, I find that Complainant has demonstrated that there are no genuine issues of material fact and that it is entitled to judgment as a matter of law as to the liability of both Spring & Soon and Y Plus. However, I find that Complainant has not demonstrated that there are no genuine issues of material fact with respect to the amount of penalty this case warrants. As a result, I

(1) GRANT Complainant's Motion for Summary Decision[1] as to liability for both Spring & Soon and Y Plus; and

(2) DENY Complainant's Motion for Summary Decision as to the appropriate civil money penalty to assess.

II. BACKGROUND AND PROCEDURAL HISTORY

On September 27, 1996, the Immigration and Naturalization Service (INS or Complainant) served a Notice of Intent to Fine (NIF) relating to Respondent Spring & Soon Fashion Inc. on Mrs. Young S. Sung at the business premises of Y Plus S Corporation, d/b/a Y Prus S Corporation. Shofi Decl.[2] ¶ 5. Mrs. Sung's husband, Mr. Chang S. Sung, is listed as Spring & Soon's

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[1] Complainant has entitled its filing a "Motion for Summary Judgment." The OCAHO Rules of Practice and Procedure provide for motions for summary decision, see 28 C.F.R. § 68.38 (1997), which are similar to motions for summary judgment under Federal Rule of Civil Procedure 56. I will treat Complainant's Motion as a motion for summary decision, and I will refer to it as such.

[2] The following abbreviations will be used throughout this Order:

Shofi Decl.	Declaration of INS Agent John Shofi, attached to Complainant's Motion to Amend Complaint
Compl.	Original Complaint
Amended Compl.	Amended Complaint
C. Mot. Default	Complainant's Motion for Default Judgment
Ans.	Answer
Ans. to Amended Compl.	Answer to Amended Complaint
C. Mot. SD	Complainant's Motion for Summary Decision
C. Mot. Compel	Complainant's Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories
SCO	Show Cause Order
R. Response SCO	Respondents' Response to Show Cause Order
C. Request Admiss.	Complainant's Request for Admissions, attached to Complainant's Motion for Summary Decision

incorporator on Spring & Soon's certificate of incorporation, see C. Request Admiss. Ex. E, and as Spring & Soon's president on its I-9 forms, see id. Ex. A, but Mrs. Sung allegedly identified herself as Spring & Soon's owner at the time of the INS inspection of Spring & Soon's I-9 forms, see Shofi Decl. ¶ 4. Mrs. Sung is listed as Y Plus' incorporator on its certificate of incorporation, see C. Request Admiss. Ex. G, and as Y Plus' president on its I-9 forms, see id. Ex. J.

By letter dated October 21, 1996, Spring & Soon timely requested a hearing in this matter through its then-attorney Mark C. Kalish. Complainant filed a five-count Complaint with the Office of the Chief Administrative Hearing Officer (OCAHO) on May 22, 1997. That Complaint, which echoes the allegations of the NIF, asserts that Spring & Soon hired or continued to employ seven listed individuals knowing that they were unauthorized to work in the United States, in violation of section 274A(a)(1)(A) or 274A(a)(2) of the INA, as codified at 8 U.S.C. §§ 1324a(a)(1)(A) and 1324a(a)(2). Compl. ¶¶ I.A-E. Complainant alleges that, on August 8, 1995, a Final Order was served on Respondent Spring & Soon for a first violation of section 274A(a)(1)(A) and/or 274A(a)(2) of the INA. Compl. ¶ I.F. Complainant also alleges that Spring & Soon committed various violations of the employment eligibility verification system, all in violation of section 274A of the INA, as codified at 8 U.S.C. § 1324a. See Compl. ¶¶ II-V.

On July 23, 1997, Mr. Kalish filed a motion to withdraw his representation of Spring & Soon in this proceeding. In support of his motion, Mr. Kalish stated that, after repeated attempts, he had been unable to communicate with his client. Specifically, Mr. Kalish said that he had had no communications with Spring & Soon since approximately January 1997. Mot. Withdraw ¶ 6. After receiving a copy of the Complaint in late May or early June 1997, Mr. Kalish tried to telephone Spring & Soon, but found that telephone service was disconnected. Id. ¶ 7. Mr. Kalish stated that, on June 16, 1997, he visited Spring & Soon's business premises at 262 West 38th Street, 15th Floor, New York, New York, but that the business no longer was there. Id. ¶ 8. Mr. Kalish stated that he then requested from directory assistance any listings for "Spring & Soon Fashions" in any of New York City's five boroughs, but that there were no such listing . Id. ¶ 9. Finally, Mr. Kalish asserted that, to the best of his knowledge, Spring & Soon no longer was doing business. Id. I granted Mr. Kalish's motion to withdraw by order dated July 24, 1997.

Complainant filed its Motion to Amend Complaint and a document entitled "Second Amended Complaint"[3] on September 3, 1997. Through its proposed amendment, Complainant sought to add Y Plus S Corporation d/b/a Y Prus S Corporation as a respondent on the grounds that it was a mere continuation of Respondent Spring & Soon Fashion Inc. and, thus, could be held responsible for the debts and/or liabilities of Spring & Soon. Also on September 3, Complainant

[3] According to the official case file, no other amended complaint had been filed. Therefore, this was not the second amended complaint but, rather, the first amendment. Thus, it will be referred to as the amended complaint.

filed its Motion for Default Judgment. Complainant stated that, as of August 14, 1997, no answer had been filed in this case. Mot. Default ¶ 4. Therefore, Respondent had "failed to plead or otherwise defend within thirty days of the receipt of [the] Complaint as required by 28 C.F.R. § 68.9(a)." Id. ¶ 5. Complainant sought default judgment against both Spring & Soon and Y Plus.

On September 11, 1997, I entered an Order Regarding Complainant's Motion to Amend and Motion for Default. In that Order, I noted that Complainant had not explained why Spring & Soon should be considered as doing business through Y Plus S Corporation d/b/a Y Prus S Corporation, other than the fact that it might have the same owner. I ordered Complainant to file a legal brief no later than September 30, 1997, in which it would discuss the facts in the record that supported its assertion that Spring & Soon is doing business through Y Plus and the applicable legal principles governing that determination. Since the NIF was not served on Spring & Soon at the address listed for it on the Complaint, I ordered Complainant also to discuss in its brief whether the NIF was properly served on Spring & Soon. I granted leave to the Sungs to file a response to Complainant's Motion to Amend, its brief, and its Motion for Default Judgment no later than October 14, 1997.

Regarding Complainant's Motion for Default, I noted that Spring & Soon still had not filed an answer as of September 11. I stated that, if I granted Complainant's Motion to Amend, Respondent would have thirty days to answer the amended complaint; even though Spring & Soon had not yet filed an answer to the original Complaint, if an amended complaint is filed, a respondent must receive a chance to answer the complaint as amended. As a result, I stated that I would defer ruling on the Motion for Default until I had ruled on the Motion to Amend. I explained, however, that Spring & Soon was in default with respect to the original Complaint and, if I denied the Motion to Amend, Spring & Soon could face a default judgment. Consequently, I ordered Spring & Soon to file an answer to the Complaint immediately upon receipt of my September 11 Order to avoid entry of a default judgment. I also ordered Spring & Soon to explain why it did not file an answer to the Complaint in a timely manner.

Complainant filed its Memorandum of Law in Support of Motion to Amend Complaint on October 14, 1997.[4] On October 17, 1997, Raymond J. Aab filed a Notice of Appearance as legal counsel for Spring & Soon and also filed Respondent's Answer to the Complaint and its Opposition to Complainant's Motion to Amend Complaint. Spring & Soon's Opposition also responded to Complainant's Motion for Default Judgment. In its Answer, Spring & Soon responded to the factual allegations of the Complaint and asserted as an affirmative defense that the NIF and the Complaint in this case were not properly served on Spring & Soon.

[4] I granted Complainant's request, communicated by letter on October 10, 1997, to extend the previous deadline to October 14.

By Order dated December 9, 1997, I granted Complainant's Motion to Amend Complaint by adding Y Plus as a respondent. Although I did not find that Y Plus was in fact a mere continuation of Spring & Soon, I granted Complainant's Motion to Amend by adding Y Plus as a respondent because Complainant had alleged enough information to allow it the opportunity to prove its allegations as to Y Plus. See Order Granting C.'s Mot. Amend at 11. Also in the December 9 Order, I addressed the issue of whether the NIF was properly served on Respondent Spring & Soon. For the reasons stated in that Order, I found that, even assuming service was not accomplished in compliance with the applicable regulation, dismissing the case to make the INS comply with the relevant regulation was unwarranted. See id. at 3-8. Additionally, I denied Complainant's Motion for Default and gave Respondents until January 8, 1998, to file their answer to the Amended Complaint.

Respondents filed their Answer to the Amended Complaint on January 12, 1998. Although the certificate of service reveals that this Answer was served by mail on January 7, 1998, "file" means that the document must be received in my office by the given deadline, not that it merely must be postmarked by then, see 28 C.F.R. § 68.8(b) (1997). I had explicitly reminded Respondents of that provision, see Order Granting C.'s Mot. Amend at 13 n.13, but they still failed to ensure that their Answer was filed by the January 8 deadline. Respondents responded to the allegations contained in the Amended Complaint, see Ans. to Amended Compl. ¶¶ 1-15, and asserted two affirmative defenses. As a first affirmative defense, Respondents alleged that service of the NIF was "not made in compliance with legal requirement." Ans. to Amended Compl. ¶ 16. As a second affirmative defense, Respondents alleged that "Y Plus S Corporation and/or Y Prus S Corporation is a separate and distinct entity from [Spring & Soon], and [Spring & Soon] is not responsible for the liabilities and conduct of Y Plus S Corporation and Y Prus S Corporation and vice versa." Ans. to Amended Compl. ¶ 17.

On April 23, 1998, Complainant filed a Motion for Summary Decision and a Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories. In the Motion for Summary Decision, Complainant asserted that on March 13, 1998, Complainant served requests for admissions on Respondents (which are attached to its Motion), and that Respondents, as of April 21, 1998, had not responded to the same. In the Motion to Compel, Complainant similarly asserted that it served Respondents with interrogatories and requests for document production on March 13, and that Respondents had failed to respond to those discovery requests as of April 21.

Respondents were entitled to file a response to Complainant's Motion for Summary Decision on or before May 6, 1998; they also were entitled to file a response to Complainant's Motion to Compel on or before May 7, 1998. See 28 C.F.R. §§ 68.11(b); 68.8(c)(2) (1997). Respondents had filed no responses to either of those Motions by the appropriate deadlines. On May 8, 1998, I issued a Show Cause Order (SCO) in which I gave Respondents the opportunity to state whether their attorney's office received the requests for admissions and the Motion for Summary Decision, and when each was received, and to show cause why I should not deem each of the admissions admitted

by Respondents pursuant to 28 C.F.R. § 68.21(b). Respondents filed their Response to the SCO on May 21, 1998. They attached to the Response copies of their answers to Complainant's requests for admissions, as well as their answers to Complainant's interrogatories and requests for production of documents, which had been served on Complainant the previous day, on May 20, 1998. Respondents' counsel stated several reasons for his failure to respond to Complainant's discovery requests in a timely manner, but he never explained why he did not seek an extension of time in which to answer discovery. Despite my explicit requirement in the SCO, Respondents' counsel also failed to state when his office received Complainant's Request for Admissions and Motion for Summary Decision. Respondents asked that I direct Complainant to accept Respondents' answers to its discovery requests. See R. Response SCO ¶ 4. Respondents still have not responded to Complainant's Motion for Summary Decision.

On May 27, 1998, Complainant filed a motion to substitute Complainant's counsel, stating that INS Assistant District Counsel Mimi Tsankov, who had been handling this case on Complainant's behalf, no longer works at the INS. Complainant also entered a notice of appearance for INS Assistant District Counsel Paul Szeto. I noted in my Order Staying Proceeding that Respondents were entitled to file a response to the substitution motion on or before June 11, 1998. See 28 C.F.R. §§ 68.11(b), 68.8(c)(2) (1997). Respondents have not filed such a response.

By Order dated May 29, 1998, I stayed this proceeding until I ruled on Complainant's Motion for Summary Decision.

III. STANDARDS FOR SUMMARY DECISION

The Rules of Practice and Procedure that govern this proceeding permit the Administrative Law Judge (ALJ or Judge) to "enter a summary decision for either party if the pleadings, affidavits, material obtained by discovery or otherwise, or matters officially noticed show that there is no genuine issue as to any material fact and that a party is entitled to summary decision." 28 C.F.R. § 68.38(c) (1996). Although OCAHO has its own procedural rules for cases arising under its jurisdiction, the OCAHO Rules of Practice specifically authorize the Judge to reference analogous provisions of the Federal Rules of Civil Procedure and federal case law interpreting them for guidance in deciding issues based on the rules governing OCAHO proceedings. OCAHO Rule 68.38(c) is similar to Federal Rule of Civil Procedure 56(c), which provides for summary judgment in cases before the federal district courts. As such, Rule 56(c) and federal case law interpreting it are useful in deciding whether summary decision is appropriate under the OCAHO rules. United States v. Aid Maintenance Co., 6 OCAHO 893, at 3 (1996), 1996 WL 73594, at *3[5] (Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary

[5] If available, parallel Westlaw citations will be given to OCAHO decisions. OCAHO decisions published in Westlaw are located in the "FIM-OCAHO" database.

Decision)(citing Mackentire v. Ricoh Corp., 5 OCAHO 191, 193 (Ref. No. 746)[6] (1995), 1995 WL 367112, at *2 and Alvarez v. Interstate Highway Constr., 3 OCAHO 399, 405 (Ref. No. 430) (1992), 1992 WL 535567, at *5, aff'd, Alvarez v. OCAHO, 996 F.2d 310 (10th Cir. 1993) (table form; text available in 1993 WL 213912)); United States v. Tri Component Product Corp., 5 OCAHO 765, 767 (Ref. No. 821) (1995), 1995 WL 813122, at *2 (Order Granting Complainant's Motion for Summary Decision) (citing same).

Facts are deemed material only if they will affect the outcome of the proceeding. See Aid Maintenance, 6 OCAHO 893, at 4, 1996 WL 735954, at *3 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986)); Tri Component, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing same and United States v. Primera Enters., Inc., 4 OCAHO 259, 260-61 (Ref. No. 615) (1994), 1994 WL 269753, at *2); United States v. Manos & Assocs., Inc., 1 OCAHO 877, 878 (Ref. No. 130) (1989), 1989 WL 433857, at * 2 (Order Granting in Part Complainant's Motion for Summary Decision). An issue of material fact is genuine if it has a "real basis in the record." Tri Component, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing Matsushita Elec. Indus. Co. v. Zenith Radio, 475 U.S. 574, 586-87 (1986)). In deciding whether a genuine issue of material fact exists, the court must view all facts and all reasonable inferences to be drawn from them "in the light most favorable to the non-moving party." Id. (citing Matsushita, 475 U.S. at 587 and Primera, 4 OCAHO at 261, 1994 WL 269753, at *2).

The party requesting summary decision carries the initial burden of demonstrating the absence of any genuine issues of material fact. Id. (citing Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986)). Additionally, the moving party has the burden of showing that it is entitled to judgment as a matter of law. United States v. Alvand, Inc., 1 OCAHO 1958, 1959 (Ref. No. 296) (1991), 1991 WL 717207, at *2 (Decision and Order Granting in Part and Denying in Part Complainant's Motion for Partial Summary Decision) (citing Richards v. Neilsen Freight Lines, 810 F.2d 898 (9th Cir. 1987)). After the moving party has met its burden, "the opposing party must then come forward with 'specific facts showing that there is a genuine issue for trial.'" Tri Component, 5 OCAHO at 768, 1995 WL 813122, at *2 (quoting Fed. R. Civ. P. 56(e)). The party opposing summary decision may not "rest upon conclusory statements contained in its pleadings." Alvand, 1 OCAHO at 1959, 1991 WL 717207, at *2 (citing Nilsson, Robbins, Dalgarn, Berliner, Carson & Wurst v. Louisiana Hydrolec, 854 F.2d 1538 (9th Cir. 1988)). The Rules of Practice and Procedure governing OCAHO proceedings specifically provide:

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[6] Citations to OCAHO precedents in bound Volumes 1-2, Administrative Decisions Under Employer Sanctions and Unfair Immigration-Related Employment Practices Laws of the United States, and bound Volumes 3-5, Administrative Decisions Under Employer Sanctions, Unfair Immigration-Related Employment Practices and Civil Penalty Document Fraud Laws of the United States, reflect consecutive decision and order reprints within those bound volumes; pinpoint citations to pages within those issuances are to specific pages, seriatim, of the pertinent volume. Pinpoint citations to OCAHO precedents in volumes subsequent to Volume 5, however, are to pages within the original issuances.

> [w]hen a motion for summary decision is made and supported as provided in this section, a party opposing the motion may not rest upon the mere allegations or denials of such pleading. Such response must set forth specific facts showing that there is a genuine issue of fact for the hearing.

28 C.F.R. § 68.38(b) (1997).

Under the Federal Rules of Civil Procedure, the court may consider any admissions on file as part of the basis for summary judgment. Tri Component, 5 OCAHO at 768, 1995 WL 813122, at *3 (citing Fed. R. Civ. P. 56(c)). Similarly, summary decision may be based on matters deemed admitted. Id. (citing Primera, 4 OCAHO at 261, 1994 WL 269753, at *2 and United States v. Goldenfield Corp., 2 OCAHO 162, 165 (Ref. No. 321) (1991), 1991 WL 531744, at *3).

IV. LEGAL ANALYSIS AND DISCUSSION

A. Requests for Admissions

Complainant's Motion for Summary Decision is based largely on the answers deemed admitted to its Request for Admissions. Requests for admissions are deemed admitted if not responded to within thirty days of service. See 28 C.F.R. § 68.21(b) (1997); see also Fed. R. Civ. P. 36(a).[7] If the requests for admission are served by ordinary mail, the responding party has five additional days in which to serve its answers and/or objections. See 28 C.F.R. § 68.8(c)(2) (1997). The requests automatically are deemed admitted if the party from whom the admissions are sought does not respond within the appropriate time limit. See Beberaggi v. New York City Transit Auth., No. 93 Civ. 1737 (SWK), 1994 WL 18556, at *2 (S.D.N.Y. Jan. 19, 1994) (citing, inter alia, Donovan v. Carls Drug Co., 703 F.2d 650, 651 (2d Cir. 1983)); American Technology Corp. v. Mah, 174 F.R.D. 687, 690 (D. Nev. 1997). A motion to deem the requests admitted is not necessary. See Beberaggi, 1994 WL 18556, at *2; Mah, 174 F.R.D. at 690 (denying a motion to deem requests for admissions admitted on the grounds that it was unnecessary, given the automatic effect of Rule 36(a)).

In the present case, Complainant served its Request for Admissions via first class mail on March 13, 1998. Respondents' answers and/or objections to those requests should have been served on or before April 17, 1998, but Respondents did not do so. In fact, Respondents did not serve their

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[7] As the OCAHO rule regarding requests for admissions is very similar to Rule 36, federal case law interpreting Rule 36 may be informative in construing the provisions of 28 C.F.R. § 68.21. Cf. United States v. Aid Maintenance Co., 6 OCAHO 893, at 3 (1996), 1996 WL 73594, at *3 (using Federal Rules of Civil Procedure provisions concerning summary judgment and federal case law regarding them as guidelines in interpreting similar OCAHO rules governing summary decision).

answers to the requests for admissions until May 20, 1998, attached as part of its response to my May 8 Show Cause Order. When Respondents failed to respond to Complainant's Request for Admissions in a timely manner, the matters of which Complainant sought admissions automatically were deemed admitted.

Admissions can be withdrawn and/or amended, upon motion. See 28 C.F.R. § 68.21(d) (1997) ("Any matter admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission."); see also Fed. R. Civ. P. 36(b). In their Response to the SCO, Respondents ask that I order Complainant to accept their responses to Complainant's discovery requests, including their answers to the requests for admissions. See R. Response SCO ¶ 4. Respondents also state reasons in support of the requested relief. See id. ¶ 3. I will treat Respondents' Response to the SCO as a motion to withdraw and to amend their prior admissions. See Rohman v. Chemical Leaman Tank Lines, Inc., 923 F. Supp. 42, 46 n.2 (S.D.N.Y. 1996) (treating party's request that its responses to requests for admissions be deemed timely filed, made in the party's counsel's affirmation in opposition to the opponent's motion for summary judgment, as a formal Rule 36(b) motion when, among other things, the grounds upon which the requested relief was sought were "clearly set forth" in the affirmation).

The OCAHO Rules of Practice provide no standard for permitting the withdrawal and/or amendment of admissions made in the context of requests for admissions. The Federal Rules of Civil Procedure, however, provide such a standard.[8] See Fed. R. Civ. P. 36(b). Under the Federal Rules, the trial judge "may permit withdrawal or amendment when the presentation of the merits of the action will be subserved thereby and the party who obtained the admission fails to satisfy the court that withdrawal or amendment will prejudice that party in maintaining the action or defense on the merits." Fed. R. Civ. P. 36(b) (emphasis added). "[T]he decision to excuse [a party] from its admissions is in the court's discretion." Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651-52 (2d Cir. 1983). "Because the language of the Rule is permissive, the court is not required to make an exception to Rule 36 even if both the merits and prejudice issues cut in favor of the party seeking exception to the rule." Id. at 652; see also American Express Travel Related Servs. Co., Inc. v. Ladouceur (In re Ladouceur), No. 95-CV-271 (RSP), 1996 WL 596718, at *3 (N.D.N.Y. Oct. 15, 1996); O'Neill v. Medad, 166 F.R.D. 19, 22 (E.D. Mich. 1996) (citing Ropfogel v. United States, 138 F.R.D. 579, 582 (D. Kan. 1991); Carls Drug, 703 F.2d at 652; Coca-Cola Bottling Co. v. Coca-Cola Co., 123 F.R.D. 97, 103 (D. Del. 1988); and Kleckner v. Glover Trucking Corp., 103 F.R.D. 553, 557 (M.D. Pa. 1984)).

[8] The Federal Rules of Civil Procedure "may be used as a general guideline in any situation not provided for or controlled by [the OCAHO Rules], the Administrative Procedure Act, or by any other applicable statute, executive order, or regulation." 28 C.F.R. § 68.1 (1997).

In the Response to the SCO, Respondents' attorney, Raymond Aab, gave several reasons for failing to respond to Complainant's Request for Admissions in a timely manner. Mr. Aab stated that he was unable to respond to Complainant's discovery requests sooner because "[t]he requests were quite voluminous and the respondent's principal and person assisting in obtaining the requested documents and answers to the discovery requests, Mr. Sung, was unable to obtain much of the requested documents until May 19th." R. Response SCO ¶ 3(a). Mr. Aab also stated the "process was rendered more problematic, because Mr. Sung speaks only halting English and he needed to return to [Respondents' counsel's] office three time to assist in the preparation of the respondents' responses to the discovery requests before he fully understood." Id. Additionally, Mr. Aab stated that he was engaged in a three-week criminal trial that "concerned allegations of fraud and involved very complicated issues and facts," and that his "time was virtually fully occupied with that trial," which did not end until 5:30 p.m. on May 19. Id. ¶ 3(b). Mr. Aab, however, did not explain why he did not seek relief from the Court to expand the deadline to respond to Complainant's discovery requests.

Respondents have not shown good cause for failing to respond to Complainant's Request for Admissions in a timely manner or for failing to request an extension of time in which to respond. As of May 20, the date on the Response, Mr. Aab stated that he had "been engaged in a criminal trial and proceedings . . . for the past three weeks." Id. Given that time frame, Mr. Aab's trial would have started sometime in the last week of April. Respondents' response to the Request for Admissions was due April 17. Mr. Aab's trial did not begin until more than one week after the response was due. The fact that a trial monopolized Mr. Aab's time for the three weeks between the last week in April and May 20 explains nothing about why Mr. Aab failed to respond to Complainant's Request for Admissions by the middle of April. Mr. Aab could have asked for an extension of time, but he did not.

The need to answer other discovery requests also did not excuse Respondents' obligation to respond to Complainant's Request for Admissions. Mr. Aab cited a delay in the ability to obtain requested documents as a reason for failing to respond to Complainant's discovery requests in a timely fashion. See id. ¶ 3(a). Any delay in obtaining the necessary documents, however, did not justify a delay in responding to the Request for Admissions.

Complainant's Request for Admissions was not voluminous. When Respondents finally responded to the requests, they denied most of them. Respondents did not need two months to answer the Request for Admissions.

Finally, Respondents did not bother to respond to Complainant's Request for Admissions until prompted by my May 8 SCO. Not only did Mr. Aab let the deadline for responding to the Request pass, but he persisted in his lack of attention and action when Complainant filed its Motion for Summary Decision, which was based in large part on the admitted requests. The Motion notified Respondents' counsel that Complainant was seeking judgment based on the matters admitted when Respondents failed to answer the Request for Admissions by the deadline. Despite the seriousness of this action, Respondents' counsel did not immediately answer the Request and move to permit

Respondents to withdraw and to amend their admissions. Not only did Respondents fail to act with the urgency that this case deserved, but they persisted in their neglect until prompted by my SCO. Although Respondents finally answered the Request for Admissions, they never have responded to Complainant's Motion for Summary Decision.

Courts have concluded there are situations in which it would not "further the interests of justice" to "deem a central fact to have been admitted by the failure of [a] pro se defendant to respond" to requests for admissions. See Local Union No. 38, Sheet Metal Workers' Int'l Ass'n, AFL-CIO v. Tripodi, 913 F. Supp. 290, 294 (S.D.N.Y. 1996). I generally agree with that philosophy, but that factual scenario is not the situation in this case. Respondents are represented by an attorney whose duty it is to advise them in legal matters and actively pursue their interests within the bounds of the law. Allowing Respondents to withdraw and amend their admissions under the present circumstances would itself work an injustice by rewarding the glaring disregard of rules designed to promote fairness and efficiency in the legal process. Cf. Alexander v. Commissioner of Internal Revenue, 926 F.2d 197, 199 (2d Cir. 1991) (stating, in the context of affirming the trial court's decisions not to permit the late filing of answers to the requests for admissions and to grant summary judgment based on matters deemed admitted, that "[i]t is not the role of appellate courts to make allowances for the patent disregard of clearly stated trial court rules that are in part designed to provide for the expeditious conclusion of litigation"). All the matters about which Complainant sought admissions in its Request for Admissions were admitted when Respondents failed to respond to the Request in a timely manner; all those items deemed admitted stay admitted.

Respondents did not answer the Request for Admissions in time, and, when they did answer, did not raise any objections to the requests. Arguably, any potential objections that Respondents might have raised were waived. Cf. Boyle v. Leviton Mfg. Co., Inc., 94 F.R.D. 33, 36 (S.D. Ind. 1981) (by answering and not objecting to requests for admissions, party waived objections for purposes of later raising them as a bar to being assessed attorney's fees for failure to admit); Pleasant Hill Bank v. United States, 60 F.R.D. 1, 4 n.1 (W.D. Mo. 1973) (by answering request for admission, party waived objection that it later raised in brief opposing motion for summary judgment).

Even if objections had not been waived, the requests for admissions in this case appear to be proper. A couple of Complainant's requests, that Y Plus is a successor in interest of Spring & Soon and that Y Plus is a mere continuation of Spring & Soon's business, C. Request Admiss. Sec. I ¶¶ 17, 23, presented the potential issue of whether they called for pure conclusions of law.

Rule 36 was amended in 1970 to resolve a conflict "in the court decisions as to whether a request to admit matters of 'opinion' and matters involving 'mixed law and fact' is proper under the rule." Fed. R. Civ. P. 36 advisory committee's note. Rule 36 now states that requests for admissions may "relate to statements or opinions of fact or of the application of law to fact," Fed. R. Civ. P. 36(a), thereby "eliminat[ing] the requirement that the matters be 'of fact,'" see Fed. R. Civ. P. 36 advisory committee's note.

Requests that call for a pure conclusion of law are improper, but requests that ask for a conclusion of law in relation to the facts of the actual case at hand are acceptable. See Abbott v. United States, 177 F.R.D. 92, 93 (N.D.N.Y. 1997); Fed. R. Civ. P. 36 advisory committee's note ("The amended provision does not authorize requests for admissions of law unrelated to the facts of the case."); see also Audiotext Communications Network, Inc. v. US Telecom, Inc., No. Civ. A. No. 94-2395-GTV, 1995 WL 625744, at *6 (D. Kan. 1995) (requests that seek application of law to the facts of the case are acceptable). Allowing requests that call for conclusions of law in relation to the facts of the case meets the Rule 36 objective of narrowing the disputed issues in the case. See Fed. R. Civ. P. 36 advisory committee's note ("An admission of a matter involving the application of law to fact may, in a given case, even more clearly narrow the issues."); Leviton Mfg., 94 F.R.D. at 35-36. In a related vein, "[t]here is nothing improper about a request simply because it goes to an ultimate fact that may be dispositive of the case . . . ." Hart v. Dow Chemical, No. 95 C 1811 1997 WL 627645, at *8 (N.D. Ill. Sept. 30, 1997).

In Abbott, a party requested admissions of law that were based exclusively on hypothetical facts given in the requests. See Abbott, 177 F.R.D. at 93. The court ruled that such requests were improper:

> Although admittedly the boundary line is not always plain between permissible questions relating to the application of law to fact and objectionable questions relating to pure questions of law, the questions posed by plaintiff in this case fall outside the bounds of proper discovery. Most telling is that plaintiffs have not posed proper questions requiring application of law to the facts peculiar to this case to clarify the government's legal theories; rather, plaintiffs have posed improper hypothetical factual scenarios unrelated to the facts here to ascertain answers to pure questions of law. This they cannot do.

Id.

In the present case, Complainant has not posed requests for admissions based on hypothetical scenarios. The requests regarding Y Plus' status as a successor in interest to and mere continuation of Spring & Soon involve conclusions of law, but in relation to the facts of this case. That is something Rule 36 clearly permits since its 1970 amendment.[9]

[9] Some post-1970 cases still say that requests that call for legal conclusions, even in relation to the facts of the case, or that go to central facts in dispute are improper. See, e.g., Whitaker v. Belt Concepts of America, Inc. (In re Olympia Holding Corp.), 189 B.R. 846, 853 (Bankr. M.D. Fla. 1995). Those cases, however, cite to pre-1970 case law, or to other post-1970 cases that cite to pre-1970 case law, in support of their position.

B. Liability Issues

To rule on Complainant's Motion for Summary Decision, I must examine whether Complainant has demonstrated a lack of genuine issue of material fact and is entitled to judgment as a matter of law. "[I]t is well settled that a failure to respond to a request for admissions will permit the district court to enter summary judgment if the facts admitted by operation of Rule 36(a) are dispositive of the case." Pleasant Hill Bank v. United States, 60 F.R.D. 1 (W.D. Mo. 1973) (citing, inter alia, Moosman v. Blitz, Inc., 358 F.2d 686, 688 (2d Cir. 1966)); see also Donovan v. Carls Drug Co., Inc., 703 F.2d 650, 651 (2d Cir. 1983). "[A]dmissions under Rule 36, even those made upon a party's default in responding, may serve as the factual predicate for summary judgment." Pakistan Int'l Airlines v. Travel Link Int'l, Ltd., No. 90 CIV. 1703 (PNL), 1991 WL 130182, at *2 (S.D.N.Y. July 9, 1991) (citing Carls Drug, 703 F.2d at 651).

1. Liability of Spring & Soon

a. Count I: knowing hire/continue to hire

In Count I of the Complaint, Complainant alleges that Respondent Spring & Soon hired seven named individuals for employment in the United States after November 6, 1986, that those seven employees were aliens not authorized for employment in the United States, and that Respondent hired those employees knowing that they were aliens not authorized to work in the United States, in violation of section 274A(a)(1)(A) of the INA, 8 U.S.C. § 1324a(a)(1)(A). Amended Compl. ¶¶ I.A-D. Alternatively, Complainant alleges that Respondent continued to employ the seven individuals knowing that they were aliens not authorized for employment in the United States, in violation of section 274A(a)(2) of the INA, 8 U.S.C. § 1324A(a)(2), and 8 C.F.R. § 274a.3. Id. ¶ I.E. It is unlawful for a person or other entity to hire for employment in the United States an alien knowing the alien is unauthorized for employment in the United States, 8 U.S.C. § 1324a(a)(1)(A) (1994), and/or to continue to employ an alien already hired knowing the alien is unauthorized for employment in the United States, id. § 1324a(a)(2).

Respondents have admitted that the seven individuals listed in Count I were illegal aliens unauthorized to work in the United States at the time of hire, see C. Request Admiss. Sec. V, and that Spring & Soon hired them knowing they were unauthorized for employment, see C. Request Admiss. Sec. I ¶ 15. The seven individuals were hired after November 6, 1986, as alleged in the Complaint, because Spring & Soon was not incorporated until after that date. See C. Request Admiss. Ex. E[10] (Mrs. Sung signed Spring & Soon's Certificate of Incorporation on October 22, 1991).

[10] Respondents have admitted that the document attached to Complainant's Request or Admissions as Exhibit E, Spring & Soon's Certificate of Incorporation, is genuine. See C. Request Admiss. Sec. VI.

In relation to Count I, Complainant has demonstrated the absence of genuine issues of material fact and that it is entitled to judgment as a matter of law. I find that Spring & Soon violated 8 U.S.C. § 1324a(a)(1)(A) by knowingly hiring the seven individuals named in Count I. I GRANT Complainant's Motion for Summary Decision with respect to Spring & Soon's liability for Count I.

b. Count II: failure to prepare/present I-9 forms

In Count II, Complainant alleges that Respondent hired five individuals for employment in the United States after November 6, 1986, and that Respondent failed to prepare the Employment Eligibility Verification Form (I-9 form) for those five employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Amended Compl. ¶¶ II.A, B, D. Alternatively, Complainant alleges that Respondent failed to present the I-9 forms for those five individuals at a scheduled inspection, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Id. ¶¶ II.C, E. An employer must prepare an I-9 form for each employee hired after November 6, 1986, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. §§ 274a.2(a), (b)(1)(i), (b)(1)(ii) (1996), and present any such I-9 forms at INS inspections, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(3) (1994); 8 C.F.R. § 274a.2(b)(2)(ii) (1997).

In its Answer to the Amended Complaint, Spring & Soon admits it "employed persons who identified themselves as indicated in the Complaint, or by different names." Ans. to Amended Compl. ¶ 3. Respondents have admitted that Spring & Soon did not prepare and/or present at the January 26, 1996, scheduled inspection I-9 forms for the five listed people. See C. Request Admiss. Sec. 1 ¶¶ 4, 9; Sec. IV. Spring & Soon admits that it hired the five people name in Count II. Since Spring & Soon was not incorporated until after November 6, 1986, it may be inferred that the hiring took place after that date.

There are no genuine issues of material fact regarding Count II's allegation of failure to prepare and/or present I-9 forms at the scheduled inspection, and Complainant is entitled to judgment as a matter of law. Therefore, I GRANT Complainant's Motion as to Spring & Soon's liability for Count II.

c. Count III: Sections one and two

In Count III, Complainant alleges that Respondent hired twenty-three individuals for employment in the United States after November 6, 1986, that Respondent failed to ensure that those twenty-three individuals properly completed section one of the I-9 form, and that Respondent failed to properly complete section two of the I-9 form for those employees, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Amended Compl. ¶¶ III.A-D. An employer must ensure that its employees properly complete section one of their respective I-9 forms, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(2) (1994); 8 C.F.R. § 274a.2(b)(1)(i)(A) (1997), and an employer must properly complete section two of the I-9 form, see 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. § 274a.2(b)(1)(ii)(B) (1997).

Respondents have admitted that the I-9 forms attached as Exhibit A to Complainant's Request for Admissions are genuine and relate to the named individuals. See C. Request Admiss. Sec. II. The I-9 forms reveal errors in sections one and two for all twenty-three listed people. Section one lacks the required attestation[11] for all twenty-three people. One I-9 form, that belonging to Bokyon Cheon (¶ III.A.4), has the "lawful permanent resident" box marked, but the employee failed to include the required alien number. All of the other I-9 forms have no attestation boxes marked, and "none" typed or written in the blank for alien numbers.

In section two, all twenty-three forms lack sufficient documentation in List A or Lists B and C. An employer must verify an employee's identity and employment eligibility by examining and recording information in section two about a List A document,[12] or by examining and recording information in section two about both a List B document[13] and a List C document.[14] See 8 U.S.C. § 1324a(b)(1)(A) (1994); 8 C.F.R. § 274a.2(b)(1)(v) (1997). Two I-9 forms, belonging to Bokyon Cheon (¶ III.A.4) and Rosa Maria Fournier (¶ III.A.9), contain social security card information in List C, but have no document information in List B and List A.[15] One form, belonging to Pedro Cabrera (¶ III.A.1), displays "I.D. requested" typed under List A, and Lists B and C are completely blank. All of the remaining I-9 forms in Count III have "I.D. requested" typed in List A and "none" typed in Lists B and C.

The twenty-three individuals named in Count III were hired after November 6, 1986, as alleged in the Complaint, because Spring & Soon was not incorporated until after that date, and because the dates of hire listed in section two on all the forms fall after that date. Evidence on the

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[11] In section one, the employee must attest, by marking the appropriate box, to one of the following: (1) that he or she is a citizen or national of the United States; (2) that he or she is a lawful permanent resident; or (3) that he or she is an alien authorized to work until a designated date. If the employee marks one of the latter two options, then he or she also must include his or her alien number in the space provided. See Form I-9, OMB No. 1115-0136 (rev. Nov. 21, 1991).

[12] List A documents establish both identity and employment eligibility. Acceptable List A documents are noted at 8 U.S.C. § 1324a(b)(1)(B) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(A) (1997).

[13] List B documents establish identity only. Acceptable List B documents are noted at 8 U.S.C. § 1324a(b)(1)(D) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(B) (1997).

[14] List C documents establish employment eligibility only. Acceptable List C documents are noted at 8 U.S.C. § 1324a(b)(1)(C) (1994) and 8 C.F.R. § 274a.2(b)(1)(v)(C) (1997).

[15] Instead, those two I-9 forms contain the words "I.D. requested" under List A and "none" under List B.

face of the forms reveals that section one lacks the required attestation and that the documentation portion of section two lacks essential document information. As there are no genuine issues of material fact in relation to Count III, and as Complainant is entitled to judgment as a matter of law, I GRANT Complainant's Motion with respect to Spring & Soon's liability for this count.

d. Count IV: Section two

In Count IV, Complainant alleges that Respondent hired one individual for employment in the United States after November 6, 1986, and failed to properly complete section two of the I-9 form for that individual, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C. § 1324a(a)(1)(B). Amended Compl. ¶¶ IV.A-C. An employer must properly complete section two of the I-9 form. See 8 U.S.C. §§ 1324a(a)(1)(B), (b)(1) (1994); 8 C.F.R. § 274a.2(b)(1)(ii)(B) (1997).

Respondents have admitted that the I-9 form for this individual, attached as part of Exhibit A of Complainant's Request for Admissions, is genuine and relates to the individual. See C. Request Admiss. Sec. II. Section two of this employee's I-9 form lacks sufficient documentation. Under List A, "petition approved" appears in the space designated for the document title, "I.N.S." appears in the space designated for the issuing authority, and "I.D. requested" appears in the space designated for the document number. A photocopy of a Form I-797 accompanies this I-9 form, but attaching a copy of the document to the I-9 form without filling in all the necessary information on the face of the I-9 form does not satisfy the documentation recording requirement, see United States v. Corporate Loss Prevention Assocs., 6 OCAHO 908, at 6 (February 5, 1997), 1997 WL 131365, at *4 (Modification by the Chief Administrative Hearing Officer of Administrative Law Judge's Order). At any rate, a Form I-797 is not an acceptable List A document. See 8 U.S.C. § 1324a(b)(1)(B) (1994); 8 C.F.R. § 274a.2(b)(1)(v)(A) (1997). In addition, this I-9 form contains the word "none" in Lists B and C.

The employee in question was hired after November 6, 1986, as shown by the facts that the date of hire noted in section two of her I-9 form falls after that date, and that Spring & Soon was not incorporated until after that date. Evidence on the face of the I-9 form that necessary elements are missing in section two demonstrates that Spring & Soon failed in its duty to properly complete section two. As there are no genuine issues of material fact in relation to Count IV, and as Complainant is entitled to judgment as a matter of law, I GRANT Complainant's Motion as to Spring & Soon's liability for this count.

e. Count V: Section one

In Count V, Complainant alleges that Respondent hired one individual for employment in the United States after November 6, 1986, and failed to ensure that individual properly completed section one of his I-9 form, in violation of section 274A(a)(1)(B) of the INA, 8 U.S.C.

§ 1324a(a)(1)(B). Amended Compl. ¶¶ V.A-C. An employer must ensure that its employees properly complete section one of their respective I-9 forms. See 8 U.S.C. §§ 1324a(a)(1)(B), (b)(2) (1994); 8 C.F.R. § 274a.2(b)(1)(i)(A) (1997).

Respondents have admitted that the I-9 form for this individual, attached as part of Exhibit A of Complainant's Request for Admissions, is genuine and that it relates to the individual. See C. Request Admiss. Sec. II. Section one of this I-9 form lacks the required attestation. No attestation boxes are marked, and "none" appears in the space designated for an alien number.

The employee in question was hired after November 6, 1986, as evidenced by the facts that the date of hire listed in section two of his I-9 form falls after that date, and that Spring & Soon was not incorporated until after that date. Evidence on the face of the I-9 form that the necessary attestation is missing in section one demonstrates that Spring & Soon failed in its duty to make sure that the employee properly completed section one. As there are no genuine issues of material fact in relation to Count V, and as Complainant is entitled to judgment as a matter of law, I GRANT Complainant's Motion with respect to Spring & Soon's liability for this count.

2. Liability of Y Plus (as successor in interest of Spring & Soon)

Respondents admit that Y Plus is successor in interest to Spring & Soon. See C. Request Admiss. Sec. I ¶ 17. A successor corporation generally is not responsible for the debts and liabilities of its predecessor. See R.C.M. Executive Gallery Corp. v. Rols Capital Co., 901 F. Supp. 630, 635 (S.D.N.Y. 1995); Delgado v. Matrix-Churchill Co., 613 N.Y.S.2d 242, 243 (App. Div. 1994). Under New York state law, there are four exceptions to that general rule: (1) when the successor corporation expressly or impliedly assumes such liability; (2) when there is a de facto consolidation or merger of the two corporations; (3) when the second corporation is a mere continuation of the first; or (4) when the transaction was fraudulently executed to escape such obligations. Delgado, 613 N.Y.S.2d at 243 (citing Grant-Howard Assocs. v. General Housewares Corp., 63 N.Y.2d 291, 296, 482 N.Y.S.2d 225 (1984); Schumacher v. Richards Shear Co., 59 N.Y.2d 239, 244 (1983)).

At least one federal court questions whether state or federal law should be applied to determine successor liability for federal causes of action.[16] See Rols Capital, 901 F. Supp. at 634. As in Rols Capital, however, that distinction does not matter for present purposes because New York state law and federal law recognize the same four exceptions to the general rule of not holding a successor corporation liable for the debts of its predecessor. See id. at 635. Like the New York courts, federal courts will impose successor liability when any of the previously stated

[16] The court in Rols Capital, however, found it unnecessary to decide that question because the New Jersey state law that it was applying recognizes the same four exceptions to the general non-liability rule that courts have applied to federal claims. See Rols Capital, 901 F. Supp. at 635.

four exceptions are present, see id. at 635-36; Lumbard v. Maglia, Inc., 621 F. Supp. 1529, 1534-35 (S.D.N.Y. 1985); see also Golden State Bottling Co., Inc. v. NLRB, 414 U.S. 168, 182 n.5 (1973).[17]

Respondents have admitted that Y Plus is a mere continuation of Spring & Soon's business. See C. Request Admiss. Sec. I ¶ 23. Respondents also have admitted sufficient facts that would justify the legal conclusion that Y Plus is a mere continuation of Spring & Soon and, thus, will be held responsible for Spring & Soon's liabilities.

A variety of factors are considered in determining whether a successor corporation is a mere continuation of the predecessor,[18] such as the following:

> (1) continuity of ownership; (2) a cessation of ordinary business and dissolution of the predecessor as soon as practically and legally possible; (3) assumption by the successor of the liabilities ordinarily necessary for the uninterrupted continuation of the business of the predecessor; and (4) a continuity of management, personnel, physical location, assets, and general business operation.

Lumbard, 621 F. Supp. at 1535 (citing Arnold Graphics Indus., Inc. v. Electronic Tabulating Corp., 775 F.2d 38 (2d Cir. 1985)). Not all of these factors are needed to show that a successor corporation is a mere continuation of the predecessor. Id. at 1535 (citing Menacho v. Adamson United Co., 420 F. Supp. 128, 133 (D.N.J. 1976)).

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[17] Successor liability may be even broader in the federal context. The Seventh Circuit states that, "in order to protect federal rights or effectuate federal policies, [successor liability] allows lawsuits against even a genuinely distinct purchaser of a business if (1) the successor had notice of the claim before the acquisition; and (2) there was a 'substantial continuity in the operation of the business before and after the sale.'" Chicago Truck Drivers, Helpers & Warehouse Workers Union (Independent) Pension Fund v. Tasemkin, Inc., 59 F.3d 48, 49 (7th Cir. 1995); see also Rols Capital, 901 F. Supp. at 635 n.4 (noting the use of this additional exception in the Seventh Circuit and stating that it is used "when the vindication of an important statutory policy necessitates the creation of this additional and even broader exception to the common-law nonliability rule").

[18] Lumbard uses the same factors to determine whether a corporation is a mere continuation of another corporation as it does to determine whether the de facto merger exception applies, although it notes that another district court tries to draw a distinction between the two in that "a de facto merger contemplates a selling corporation and a purchasing corporation, [but] 'a continuation accomplishes . . . something in the nature of a corporate reorganization, rather than a mere sale.'" Lumbard, 621 F. Supp. at 1535 n.8 (quoting Ladjevardian v. Laidlaw-Coggeshall, Inc., 431 F. Supp. 834, 839 (S.D.N.Y. 1977)).

Respondents have admitted that Y Plus has the same directors, officers and shareholders as Spring & Soon. See C. Request Admiss. Sec. I ¶¶ 30-32. They also have admitted that Y Plus acquired all or most of Spring & Soon's assets for cash, see id. Sec. I ¶ 18, that Y Plus paid little or no consideration for the transfer of assets to itself from Spring & Soon, see id. Sec. I ¶ 22, and that Spring & Soon was unable to pay its creditors' claims following the transfer of assets to Y Plus, see id. Sec. I ¶ 21.

Respondents have admitted that Y Plus was formed shortly before the time of acquisition of Spring & Soon's assets, see id. Sec. I ¶ 20, and that Spring & Soon ceased business operations and dissolved shortly after Spring & Soon transferred its assets to Y Plus, see id. Sec. I ¶ 19. Respondents admitted that Y Plus filed for incorporation in New York on February 22, 1996, and that Spring & Soon ceased doing business the following month, during March 1996. See id. Sec. I ¶¶ 45-46.

Spring & Soon and Y Plus share a common business type and even some employees. As a result of Respondents' admissions, it is conclusively determined that Y Plus manufactures the same or similar product as Spring & Soon and that Y Plus uses Spring & Soon production facilities. See id. Sec. I ¶¶ 24-25. Specifically, Spring & Soon and Y Plus both engaged and/or engage in the business of garment manufacturing. See id. Sec. I ¶¶ 43-44. Respondents have admitted that some employees that worked for Spring & Soon worked for Y Plus. See id. Sec. I. ¶ 26. In particular, Respondents admitted that Y Plus hired the following two employees of Spring & Soon: Bernardo Perez-R, aka Gilberto Quechol Paccheco, and Maria Rosario Gracia, aka Rosa Garcia-Tenecela. See id. Sec. I ¶ 27. In addition, Respondents admit that Y Plus uses Spring & Soon's business goodwill, see id. Sec. I ¶ 29, that Y Plus holds itself out as the effective continuation of Spring & Soon, see id. Sec. I ¶ 35, and that Y Plus uses the same corporate or product name as Spring & Soon, see id. Sec. I ¶ 36.

Respondents admit that Mr. Sung owned Spring & Soon, see id. Sec. I ¶ 38. They also admit that he holds or has held stock in Y Plus, see id. Sec. I ¶ 34, and that he works at and has held a management position at Y Plus, see id. Sec. I ¶¶ 41-42. Respondents admit that Mrs. Sung owns Y Plus, see id. Sec. I ¶ 37, but also that she held stock in, worked at, and held a management position at Spring & Soon, see id. Sec. I ¶¶ 33, 39-40.

Additionally, Y Plus filed for incorporation approximately one month after the NIF was served on Spring & Soon. See C. Request Admiss. Sec. I ¶ 45; C. Request Admiss. Ex. G (Y Plus Certificate of Incorporation); NIF at 2. All of the above facts provide ample basis for concluding that Y Plus is a mere continuation of Spring & Soon.

As a result of Respondents' admissions, there are no genuine issues of material fact with respect to the issue of whether Y Plus is a mere continuation of Spring & Soon and, thus, is responsible for Spring & Soon's liabilities. Complainant has demonstrated that it is entitled to judgment as a matter of law that Y Plus is a mere continuation of Spring & Soon and that Y Plus

is accountable for Spring & Soon's liabilities in this case. Consequently, I GRANT Complainant's Motion for Summary Decision as to Y Plus' liability for Counts I-V of the Amended Complaint.

C. Penalty Issues

In its Motion for Summary Decision, Complainant asks me to award a civil money penalty in the full amount requested in the Amended Complaint. See C. Mot. SD at 3. Interestingly enough, Complainant does not ask, in its Motion for Summary Decision, for the imposition of a cease and desist order; Complainant seeks such an order in the Amended Complaint.

1. Substantive violations

A first-time violator of the knowing hire provision under 8 U.S.C. § 1324a(1)(A) shall receive an order to cease and desist from such violations and to pay a civil money penalty of not less than $250 and not more than $2,000 for each unauthorized alien knowingly hired. See 8 U.S.C. § 1324a(e)(4)(A)(i) (1994). For a violator of the knowing hire provision who previously has been subject to one order for a knowing hire or continue to employ violation, the INA mandates a cease and desist order and a civil money penalty of not less than $2,000 and not more than $5,000 for each unauthorized alien knowingly hired. See id. § 1324a(e)(4)(A)(ii).

Complainant seeks a total penalty of $30,800 for the seven violations contained in Count I, which it says breaks down into $4,440 for each of the seven violations. See Amended Compl. at 3. First of all, Complainant's calculation does not compute. If Complainant is seeking a total civil money penalty with respect to Count I of $30,800, then it would be requesting $4,400, not $4,440, for each of the seven violations. If Complainant is seeking $4,440 for each of the seven violations, however, then the total requested penalty would be $31,080.

Secondly, in its Motion, Complainant does not discuss any factors that support the penalty amount requested, whether it is $4,400 or $4,440 per violation. Complainant demonstrates that the $2,000 through $5,000 per violation range is appropriate in this case,[19] but it does not establish why either $4,400 or $4,440 should be the appropriate level within that range.

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[19] Spring & Soon previously has been the subject of a Final Order issued by the INS pursuant to a settlement agreement between Spring & Soon and the INS stemming from allegations raised against Spring & Soon in a prior investigation. See C. Request Admiss. Ex. C (Final Order), Ex. D (Settlement Agreement). Respondents have admitted to the genuineness of those two documents. See C. Request Admiss. Sec. VII. In the Settlement Agreement, Spring & Soon and the INS specifically agreed "that future violations of Section 274A of the [INA] by the employer will be treated as a second or subsequent offense." C. Request Admiss. Ex. D ¶ 3. The Settlement Agreement also provided that the INS Final Order "is a final and unappealable order pursuant to [INA] Section 274A(e)(3)(B)," and that it "shall have the same force and effect as an Order made after a full hearing." C. Request Admiss. Ex. D ¶ 6.

2. Verification violations

A person or entity who violates the employment eligibility verification system under 8 U.S.C. § 1324a(1)(B) shall receive "a civil money penalty in an amount of not less than $100 and not more than $1,000 for each individual with respect to whom such violation occurred." 8 U.S.C. § 1324a(e)(5) (1994). The statute mandates five factors that must be considered when setting a civil money penalty for verification violations: (1) size of the business; (2) good faith; (3) seriousness of the violations; (4) whether the individual was an unauthorized alien; and (5) history of previous violations. Id. In assessing civil money penalties for verification, or paperwork, violations, I generally have followed the line of OCAHO cases that have applied a mathematical, rather than judgmental, approach to setting the penalty. See United States v. Carter, 7 OCAHO 931, at 46 (1997), 1997 WL 602725, at *34; United States v. Skydive Academy of Haw. Corp., 6 OCAHO 848, at 10 (1996), 1996 WL 312123, at *9-10; United States v. Felipe. Inc., 1 OCAHO 626, 629 (Ref. No. 93), 1989 WL 433965, at *4, aff'd by CAHO, 1 OCAHO 726, 732 (Ref. No. 108) (1989), 1989 WL 433964, at *5 (holding that the mathematical approach is an acceptable, although not exclusive, approach to setting civil money penalties in paperwork cases). The mathematical approach works in the following manner:

> [T]he approach [is] to divide $900, the difference between the statutory $1,000 maximum and statutory $100 minimum, by five for the five statutory criteria [established in 8 U.S.C. § 1324a(e)(5)], arriving at a general amount of $180 for each penalty factor. The $180 per factor is not rigidly applied, because certain penalty factors may justify a greater penalty amount than others.

Carter, 7 OCAHO 931, at 47, 1997 WL 602725, at *34.

With respect to Count II, Complainant seeks a civil money penalty of $4,400, or $880 for each of the five violations contained therein. See Amended Compl. at 3. For Count III, Complainant seeks a penalty of $18,780, which breaks down into a penalty of $660 for each of the three violations contained in Amended Complaint paragraphs III.A.4, 9, and 19, and $840 for each of the twenty remaining violations in the count. See id. at 5. Complainant requests a civil money penalty of $820 for the one violation contained in Count IV, see id., and a civil money penalty of $630 for the one violation contained in Count V, see id. at 6.

Complainant has demonstrated a history of prior violations, see C. Request Admiss. Exs. C, D, so aggravation of the civil money penalty is warranted based on that factor. Respondents have admitted that certain individuals were, at the time of hire, illegal aliens unauthorized to work in the United States, see C. Request Admiss. Sec. V, so Complainant has met its burden of showing that

penalty enhancement factor for certain parts of the Complaint.[20] Complainant, however, does not address in its Motion for Summary Decision what other factors it alleges warrant enhancement of the civil money penalty. Complainant requests a higher penalty for each paragraph of Counts II-V than is warranted by the penalty factors Complainant has shown. Therefore, Complainant has not met its burden of showing that the full requested civil money penalty for those counts is justified.

Complainant has not demonstrated that it is entitled to the full civil money penalty requested in the Amended Complaint, with respect either to the substantive or to the verification violations. Complainant's Motion for Summary Decision is DENIED as to penalty.

D. Complainant's Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories

Complainant served its Motion to Compel Response to Request for Production of Documents and Answer to Interrogatories on April 22, 1998. Complainant asserted that it served Respondents with interrogatories and requests for document production on March 13, 1998, and that Respondents had failed to respond to those discovery requests as of April 21. C. Mot. Compel ¶¶ 1-3. Responses to those discovery requests were due April 17, 1998. Although Respondents did not answer the interrogatories and request for production of documents on time, they did provide responses attached to their Response to the SCO, which was served May 20, 1998.

Complainant's Motion to Compel is DENIED as moot because Respondents now have responded to Complainant's interrogatories and request for production of documents. Nothing in the answers to the interrogatories and request for production of documents will be taken to contradict matters established as a result of the deemed admissions. See 28 C.F.R. § 68.21 (1997) ("Any matter

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[20] Specifically, Respondents have admitted that all five of the individuals listed in Count II were unauthorized aliens, and that the individuals listed in Count III paragraphs A.5, 7, 8, 10, 18, and 20 were unauthorized aliens. Therefore, aggravation of the civil money penalty is warranted for those particular paragraphs in Counts II and III based on the presence of unauthorized aliens factor. Those paragraphs, however, are not the only ones for which Complainant seeks a penalty enhanced more than in other paragraphs. Respondents have admitted that twenty-nine named individuals were taken into INS custody and transported from Spring & Soon's place of business as a result of the INS inspection, see C. Request Admiss. Sec. I, ¶ 7, but that admission alone does not necessarily mean that all twenty-nine of those people were unauthorized aliens. Also, Complainant has attached documents entitled "Order to Show Cause and Notice of Hearing" to some of the I-9 forms that it includes as Exhibit A to its Request for Admissions, but Complainant only asked Respondents to admit that the attached I-9 forms are genuine and relate to the named individuals, see C. Request Admiss. Sec. II; Complainant did not ask Respondents to admit that the documents accompanying the I-9 forms and also included in Exhibit A are accurate and genuine copies.

admitted under this section is conclusively established unless the Administrative Law Judge upon motion permits withdrawal or amendment of the admission.") (emphasis added); see also Fed. R. Civ. P. 36(b) ("Any matter admitted under this rule is conclusively established unless the court on motion permits withdrawal or amendment of the admission.") (emphasis added). Even though all liability issues are established in Complainant's favor, some of the responses to the interrogatories and document production requests still may be useful for the penalty issue. If Complainant believes that any responses to the interrogatories and requests for production of documents are incomplete or nonresponsive, it retains the right to file a motion to compel.

E. Complainant's Motion to Substitute Counsel

Complainant filed a motion to substitute counsel, along with a notice of appearance for INS Assistant District Counsel Paul Szeto, on May 27, 1998. Complainant stated that INS District Attorney Mimi Tsankov, who had been handling the case, no longer worked for the INS. Subst. Mot. at 1. I noted in my May 29 Order Staying Proceeding that Respondents were entitled to file a response to the substitution motion on or before June 11, 1998. To date, Respondents have not filed such a response. Because Complainant's request is reasonable, and because Respondents have offered no objection, Complainant's Motion to substitute counsel is GRANTED. All further documents in this case will be served on Mr. Szeto as listed in the attached certificate of service.

V. CONCLUSION

Respondents have admitted all the matters contained in Complainant's Request for Admissions by virtue of the fact that they failed to respond to the Request in a timely manner. For the reasons stated previously in this Order, I will not permit Respondents to withdraw and to amend those admissions. Complainant's Motion for Summary Decision is GRANTED with respect to liability as to both Respondents, but DENIED with respect to penalty. Complainant's Motion to Compel is DENIED as moot. Complainant's motion to substitute counsel is GRANTED.

The only remaining issues in this case are the penalties to be assessed. No later than July 20, 1998, the parties shall file[21] either a joint or separate pleadings proposing procedural dates for the remainder of this case. Specifically, the parties shall state whether, as to remaining penalty issues, they waive an evidentiary hearing on penalty and wish to submit documentary evidence and briefs. If a party wishes to present oral testimony on penalty, then, not later than July 20, 1998, it shall file a witness list. The witness list shall state the name, address (including city and state), title (if applicable) and business telephone number of each witness; shall describe the subject matter of the testimony and the specific issues on which the witness will testify; shall state the exhibits, if any, that shall be offered through each witness; and shall state for each witness the approximate amount

[21] "File" means that the document must be received in my office by the given date, not that it merely must be postmarked by then. See 28 C.F.R. § 68.8(b) (1997).

of time needed for the direct examination of the witness. Any modifications to the witness list shall not be made later than thirty days before the start of hearing unless good cause is shown and specific permission to do so is granted by the judge.

If a party seeks an evidentiary hearing, it also shall state approximately how much time it believes would be needed for the hearing, and it shall propose several dates for the hearing. If a hearing takes place, it will be conducted where the parties are located, in the New York area. If a party prefers to submit the penalty issue on briefs, it shall propose a briefing schedule. The stay of proceeding, entered by Order of May 29, 1998, hereby is lifted.

ROBERT L. BARTON, JR.
ADMINISTRATIVE LAW JUDGE